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No.

IN THE

Supreme Court of the United States

PATTI L. REAMES, PETITIONERS

v.

STATE OF OKLAHOMA, *ex rel.* OKLAHOMA HEALTH CARE AUTHORITY; OKLAHOMA DEPARTMENT of HUMAN SERVICES; MICHAEL FOGARTY; HOWARD HENDRICK,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A person with disabilities under the age of 65 may fund a Trust created under 42 U.S.C. § 1396p(d)(4)(A) (hereinafter "(d)(4)(A) Trust") with her "assets,"and those assets will be exempt for purposes of "eligibility for" and the "amount of" Medicaid benefits she can receive to pay for long term care in a nursing home. 42 U.S.C. § 1396p(d)(1). "Assets" are defined as including all income and resources of the individual. 42 U.S.C. § 1396p(e)(1).

The question presented is whether "income of the individual" which is placed into a (d)(4)(A) Trust is exempt for purposes of determining the "amount of" Medicaid benefits to be received, in other words, exempt from being counted as a co-pay to the nursing home each month. An additional question presented is whether or not the "income of the individual" must be assigned to the (d)(4)(A) Trust in order to be considered exempt from co-pay. If it must be assigned, then is the assignment to the Trust to protect the Social Security Disability benefit in violation of the anti-alienation provision of the Social Security Act, 42 U.S.C. § 407(a)?

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---

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Patti Reames respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Tenth Circuit Court of Appeals entered on June 14, 2005, and for which a timely filed petition for rehearing and petition for rehearing en banc was denied on September 26, 2005.

OPINIONS BELOW

The opinion of the United States Tenth Circuit Court of Appeals is reported at 411 F.3d 1164 (10th Cir. 2005), and is reprinted in the appendix hereto p. 1a, *infra*. The order denying the petition for rehearing is reprinted at p. 31a, *infra*. The unreported decision and order of the

United States District Court for the Western District of Oklahoma, entered on December 3, 2003, is reprinted at p.18a, *infra*. The administrative decision of the Director of the Oklahoma Department of Human Services issued on November 19, 2002 is reprinted at p. 25a, *infra*.

JURISDICTION

The United States Tenth Circuit Court of Appeals issued its decision on June 14, 2005. A timely Petition for Rehearing and Rehearing En Banc was denied on September 26, 2005. The jurisdiction of this Court to review the judgment of the United States Tenth Circuit Court of Appeals is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

With regard to the exempt Trust at issue in this case, the Medicaid law at 42 U.S.C. § 1396p states in pertinent part:

> (d) Treatment of trust amounts
> (1) For purposes of determining an individual's eligibility for, or amount of, benefits under a State plan under this subchapter, subject to paragraph (4), the rules specified in paragraph (3) shall apply to a trust established by such individual.
> ....
> (4) This subsection shall not apply to any of the following trusts:
> (A) A trust containing the assets of an individual under age 65 who is disabled (as defined in section 1382c(a)(3) of this title) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a

> court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter.

Assets for purposes of § 1396p(d)(4)(A) are defined in § 1396p(e)(1):

> (e) Definitions In this section, the following definitions shall apply:
> (1) The term "assets", with respect to an individual, includes all income and resources of the individual.....

The anti-alienation provisions of the Social Security Act, 42 U.S.C. § 407(a), state in pertinent part:

> (a) In general. The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

Because of its length, the relevant provisions of the State Medicaid Manual (SMM) as promulgated by the federal Centers for Medicare and Medicaid Services (CMS) are set forth in the appendix at p. 33a, *infra*.

STATEMENT

Patti Reames is now 53 years old and is physically disabled due to Multiple Sclerosis (MS). Patti Reames is not mentally disabled. For the past approximately 6 years, Patti's MS has forced her to reside in a nursing home.

On February 26, 2002, a Special Needs Trust (SNT), entitled "The Patti Reames Trust," was created for Patti's benefit as authorized by 42 U.S.C. § 1396p(d)(4)(A), hereinafter referred to as "(d)(4)(A) Trust." Patti's Social Security Disability (SSD) payment is direct deposited monthly to the Trust bank account. In 2002, Patti applied for Medicaid to pay for her nursing home care and was approved as of February 27, 2002. However, the notice of approval required Patti to pay almost $800 of her approximately $850 monthly SSD income to the nursing home each month as a co-pay. Patti's SSD income is her only means to obtain physical therapy not covered by Medicaid as well as to afford to escape from the nursing home on occasion for an outing to a restaurant, the mall or cultural events as any other 53 year old person desires to experience.

Patti's SSD payment is directly deposited to the (d)(4)(A) Trust each month and consequently, pursuant to federal law, Patti alleges the SSD payment is part of the (d)(4)(A) Trust assets. 42 U.S.C. §1396p(d)(4)(A) and §1396p(e)(1). Patti alleges that federal law requires that income of an individual deposited into the Trust becomes a Trust "asset", 42 U.S.C. §1396p(e)(1), and that "assets" in the Trust are exempt in determining Patti's eligibility for and amount of Medicaid benefits, 42 U.S.C. §1396p(d)(1). Patti further alleges that OKDHS, contrary

to federal law, is requiring that the SSD payment deposited into the Trust be withdrawn and used as a co-pay to the nursing home thus reducing the 'amount of' Patti's Medicaid benefits. 42 U.S.C. §1396p(d)(1). OKDHS' requirement that Patti withdraw funds from her (d)(4)(A) Trust to pay a nursing home contradicts the terms and purposes of the Trust as a "Special Needs Trust" which by its own terms must not pay for food or shelter for Patti.

Patti filed appropriate administrative appeals with the Oklahoma Department of Human Services (OKDHS) which resulted in a final decision by Defendant Howard Hendrick Director of OKDHS which upheld the co-pay calculation based in part (1) on the non-assignability of the SSD payment to the Trust pursuant to 42 U.S.C. §407(a), or (2) if the deposit was made in the month of receipt then the decision held that the regulations in the SMM had no persuasive effect, and even though the income was deposited to the Trust it still must be paid out as a co-pay to the nursing home. Patti then filed her Complaint in the Federal District Court seeking relief from OKDHS' misinterpretation of federal law.

During oral arguments, again the issue arose of whether or not Patti's SSD payment must be "assigned" or simply deposited within the month of receipt to the (d)(4)(A) Trust. The attorney for OKDHS stated that case did not turn on whether the SSD payment was assigned, or whether Patti received it first and then placed it in the trust, or whether SS places it directly in the trust, but that the SMM only required it to go into the trust in the month of receipt. Therefore, the 407(a) issue was irrelevant. However, despite this concession that the SSD payment did not have to be assigned, the District

Court upheld the Director's decision on the co-pay calculation ruling that the SSD payments placed in the (d)(4)(A) Trust must be subjected to post-eligibility rules for treatment of income resulting in a co-pay to the nursing home. The District Court decision was also based on 407(a)'s anti-alienation clause.

Patti now appeals from the decision of the U.S. Tenth Circuit Court of Appeals which affirmed the co-pay calculation. The Court concluded that income from sources 'other than Social Security' could be protected from co-pay using a (d)(4)(A) Trust. *Reames* at 1171. Thus, the Court discriminates between an employee with a private pension which can be assigned to a (d)(4)(A) Trust and an employee who relies on the public insurance system of Social Security. Additionally, the Court concluded that §407(a) bars Patti from assigning her SSD benefits to the Trust even though she does it voluntarily. Patti asserts that the Trust is the only place in which the SSD benefits will be truly protected for her benefit instead of being taken by the state for a nursing home co-pay, and therefore, she should be permitted to voluntarily assign those benefits to her trust for her benefit, if the Court determines that the federal law requires such assignment. Patti further asserts that the plain language of the federal law exempts the deposit of income and does not require assignment.

The Oklahoma Health Care Authority establishes Oklahoma Medicaid policy and OKDHS determines eligibility for Medicaid under the OHCA's policies. Therefore, OHCA and its director, Michael Fogarty, have also been named as Defendants in these proceedings.

The District Court, as the court of first instance, had subject matter jurisdiction over this case because the controversy involves a federal question under 42 U.S.C. §1983. The District Court had jurisdiction pursuant to 28 U.S.C. §1343(a)(3) and §1367(a).

REASONS FOR GRANTING THE PETITION

I. The Decision Below Is Inconsistent With Decisions of at Least Five Other Circuit Courts of Appeal

The Tenth Circuit holds that the "plain language" of § 407 prohibits any assignment of social security benefits regardless of whether such a transfer would benefit the assignor. *Reames v. State of Oklahoma*, 411 F. 3d 1164, 1173 (10th Cir. 2005). This interpretation of § 407 is at odds with at least five other circuit courts' decisions addressing the assignment or attachment of social security benefits. *See Lopez v. Washington Mutual Bank*, 302 F.3d 900, 904 (9th Cir. 2002), *Dep't of Health and Rehabilitative Servs. v. Davis*, 616 F.2d 828, 831 (5th Cir. 1980), *Citronelle-Mobile Gathering, Inc. v. Watkins*, 934 F.2d 1180, 1192 (11th Cir. 1991), *Fetterusso v. New York*, 898 F.2d 322, 328 (2nd Cir. 1990), *Johnson v. Wing*, 178 F.3d 611, 615 (2nd Cir. 1999). Unlike the Tenth Circuit, other circuit courts have interpreted § 407 in light of its purpose: to protect social security beneficiaries from creditors' claims, thereby preserving the benefits for "financial, medical, rehabilitative and other services to needy individuals." *Watkins* at 1192; *Davis* at 831. *See* 42 U.S.C. § 301.

The Eleventh Circuit looked beyond the "express language" of § 407, finding an implied exception when "the

reaching of Social Security benefits is not going to impair the ability of the recipient to satisfy his or her basic needs." *Watkins* at 1192. In *Watkins*, the court allowed creditors to garnish $2300 of social security payments that were in an account containing $63,000. To allow the debtor, who controlled over $10 million in assets and had fled to Switzerland, to seek protection under § 407 would, in the court's words, "make a mockery of the purposes of the Social Security payments in general as well as the protections of them provided by § 407." *Id.*

Several circuit courts have made a distinction between involuntary transfers, which are prohibited, and voluntary assignments, which are permitted. The Second Circuit in *Fetterusso* held that the State Office of Mental Health did not violate § 407 when it sought reimbursement from patients' social security benefits that were deposited into hospital accounts. *Fetterusso* at 324-25. The court interpreted § 407 to prohibit involuntary seizure of social security benefits, but to allow voluntary assignment of benefits to pay for the cost of treatment. *Id.* at 328. "[S]ection 407(a) is violated when the state places itself in the position of a preferred creditor or coerces payment from protected benefits. . . .There is no basis for concluding that any of the appellants did not voluntarily agree to the use of their social security benefits to pay the costs of their care and treatment." *Id.* (citations omitted).

Likewise in *Lopez*, the Ninth Circuit enforced the plaintiffs' voluntary assignments to the bank in order to satisfy overdraft charges from future deposits into the accounts, including the plaintiffs' social security benefits. *Lopez*, 302 F.3d at 904. The court stated there was "no

indication that the plaintiff did not voluntarily agree to apply their Social Security benefits in such a fashion." *Id.*

The Second Circuit in *Wing* made the clearest statement of this voluntary/involuntary distinction adopted by these circuits. The court held that a homeless shelter did not violate § 407 by requiring compensation from the plaintiff's social security payments as a condition of continued residence. The court stated, "[I]f the payment of benefits is voluntary, it does not violate the anti-attachment statute." *Id.*

The Tenth Circuit acknowledges that the purpose of § 407 is "to protect Social Security beneficiaries and their dependents from the claims of creditors." *Reames* at 1172. Nevertheless, the court applies the statute in a manner that undermines this purpose, bringing harm to the very persons § 407 was enacted to protect. This rigid approach is inconsistent with other circuit court decisions interpreting § 407 in light of its purpose. The application of § 407 in cases where voluntary assignment will benefit the assignor should therefore be clarified by this Court.

If assignment is required to protect Patti's benefits within her Trust, then this Court should permit her to make the voluntary assignment to the Trust which is the only place her SSD benefits will truly be protected for her benefit in the spirit of § 407. To hold as the Tenth Circuit has discriminates against Patti and those who rely upon the public disability insurance system under SS versus those who fund private disability insurance policies or company-sponsored benefits which would be assignable to a (d)(4)(A) trust and, in turn, exempt from co-pay.

The result Patti proposes is the same conclusion reached by at least one other state, New York. *See Matter of Kennedy*, 3 Misc.3d 907, 779 N.Y.S.2d 346 (Surr. Ct. Nassau Co. 2004). There is currently a conflict among the states as to how income of (d)(4)(A) Trust beneficiaries is being treated.

II. The Decision Below Is Inconsistent with the Supreme Court's Holding in *Wash. State Dep't of Soc. & Health Servs. v. Keffeler*

The Tenth Circuit's broad interpretation of § 407 conflicts with this Court's holding in *Wash. State Dep't of Soc. & Health Servs. v. Keffeler*, 537 U.S. 371, 385 (2003). In *Keffeler*, this Court held that the term "other legal process" in § 407 should be understood in context,

> "much like the processes of execution, levy, attachment, and garnishment, and at a minimum, would seem to require utilization of some judicial or quasi-judicial mechanism, though not necessarily an elaborate one, by which control over property passes from one person to another in order to discharge or secure discharge of an allegedly existing or anticipated liability." *Id.*

Applying this more narrow interpretation of § 407, this Court held that the Washington Department of Social and Health Services did not violate § 407 when, as a representative payee, it used foster children's social security benefits to help pay for the costs of providing care. *Id.* at 386. The Court reasoned that the reimbursement scheme was permissible because the department had no enforceable claim, did not exercise any judicial or quasi-judicial authority to obtain the assets,

and used funds that were already in its possession and control. *Id.*

In *Keffeler*, the Court analyzed the statutory limiting language of "legal process" in restricting the applicability of the anti-attachment portion of § 407. Similarly, like the anti-attachment portion of § 407, the anti-assignment portion of § 407 has a similar statutory limitation restricting its application only "at law or in equity." This terminology "at law or in equity" requires, just as "legal process" requires, that there be some form of judicial or quasi-judicial mechanism involved before § 407 is applicable.

Like *Keffeler*, the Special Needs Trust established for Patti's benefit does not exercise judicial or quasi-judicial authority or have an enforceable claim to satisfy a debt or liability. The assignment by Patti to her trust does not employ "legal process" as defined by this Court. The Tenth Circuit's broad application of § 407 and refusal to recognize Patti's assignment of her benefits to the trust is therefore inconsistent with this Court's interpretation of the scope of § 407.

III. The Decision Below Misapplies the *Chevron* test

It should be noted that the Tenth Circuit was confused about the origin of the State Medicaid Manual. The decision states, "Oklahoma sets forth its policies for administering Medicaid benefits in its State Medicaid Manual ("SMM")." *Reames* at 1169. However, the SMM is published by the Centers for Medicaid and Medicare Services ("CMS") as delegated by the Secretary of Health and Human Services. The SMM consists of federal

guidelines which were not subject to notice and comment rule making procedure. The Tenth Circuit's references to the SMM in its decision continually state and infer that it was established by the State of Oklahoma instead of at the federal level by CMS.

The State of Oklahoma sets forth its Medicaid eligibility policy in the Oklahoma Administrative Code ("OAC") as established by the Oklahoma Health Care Authority. The OAC does not address the issues in this case.

The Tenth Circuit misapplied the *Chevron* test in its interpretation of 42 U.S.C. § 1396p(d) and the SMM. *Chevron U.S.A., Inc. v. National Res. Def. Council*, 467 U.S. 837, 842-43 (1984). It is obvious from the Court's misunderstanding about the authoring agency of the SMM, and its statements such as "the pastiche of references and incorporations required...is so...complex," "the tortured concatenation of United States Code provisions" and "based on Medicaid's complex eligibility rules" that the Court has become so focused on attempting to make sense of the regulations that it has overlooked the straight-forward, clear language of the federal statute.

Under *Chevron*, if the statute is clear, the Court's analysis ends there. Title 42 U.S.C. § 1396p(d)(4)(A) protects the "assets" of a disabled individual placed in a special needs trust. Section 1396p(e)(1) defines "assets" as "all income and resources of the individual." The statute does not require assignment of income. The Tenth Circuit recognized, "Nothing in § 1396p(d)(4)(A) addresses the assignment of Social Security benefits, or assignment at

all." *Reames* at 1173. That is because assignment is not required.

The statute does not require the income to belong ab initio to the Trust or be the Trust's income. On the contrary, it is the "individual's income" and to require it to be assigned to the Trust to actually become the "Trust's income" violates the clear language of the statute. The "individual's income" deposited to the Trust is exempt.

The Tenth Circuit goes so far as to recognize that, "In the end, 1382(a) includes government benefits in the definition of income, and §1396p(d)(1) indirectly endorses treating money in a Special Needs Trust the same for both eligibility and 'amount-of' determinations." *Id.* at 1171. Yet, the Tenth Circuit became bogged down in the quagmire of regulations which were not subject to notice and comment rule-making procedure, some of which were enacted before section (d)(4)(A) was enacted, to determine that because the regulations are so complex, the state's interpretation is not unreasonable. Contrary to *Chevron*, the Tenth Circuit is allowing language in a policy manual, issued with no system of checks and balances to insure that its content was correct or accurate, to be the "confusion factor" that determines that the clear application of the statute is unwarranted.

The result is a system which discriminates against people who rely upon the public disability insurance benefits of the Social Security system in favor of those who chose the private sector to fund disability insurance benefits which may be assignable. Additionally, it is contrary to a plain reading of the statute and is clearly not what Congress intended.

IV. The Tenth Circuit's Interpretation Violates Important Public Policy Depriving Thousands of Persons with Disabilities the Resources §407 and §1396p(d)(4)(A) Intended to Make Available To Them

The Court attempts to dismiss concerns about the negative impact of its decision on disabled persons by characterizing those affected as a "narrow subclass" and the resources of which they are deprived as a "narrow carve-out." *Reames* at 1172. The court erroneously ignores significant and uncontroverted evidence in the record regarding the significant negative impact this "narrow carve-out" will potentially have on thousands of younger disabled persons.

With up to 350,000 persons diagnosed with multiple sclerosis (MS) in the United States each year, MS is the most common disabling disease suffered by younger people in this country. Buchanan, Robert J. et. al., *Analysis of the minimum data set: comparisons of nursing home residents with multiple sclerosis to other nursing home residents*, Multiple Sclerosis, 512 (2002). Between 20-25% of persons with MS require long-term care at some point during their illness; approximately 5% will require nursing home care. *Id.* In 1985 there were 82,300 persons 55 years or younger living in nursing facilities. Buchanan, R.J., *The Difficulty Placing Younger Medicaid Beneficiaries in Nursing Facilities*, American Journal of Physical Medicine & Rehabilitation, Vol 72, No. 4, 295 (1993).

Younger nursing home residents suffering from MS and other disabling diseases have different needs than older residents. The average nursing home stay of

younger residents is significantly longer than that of elderly residents. Buchanan, R.J., *The Difficulty Placing Younger Medicaid Beneficiaries in Nursing Facilities*, American Journal of Physical Medicine & Rehabilitation, Vol 72, No. 4, 295 (1993). Younger residents tend to be more mentally alert than older residents. Buchanan, Robert J. et. al., *Analysis of the minimum data set: comparisons of nursing home residents with multiple sclerosis to other nursing home residents*, Multiple Sclerosis, 512 (2002). Unfortunately, nursing homes generally are not equipped to provide sufficiently stimulating activities for younger, more cognitively active residents. *Id.* The combination of longer stays, isolation from persons their own age, and lack of mental stimulation makes living in nursing facilities particularly difficult for younger disabled people.

To improve the situation of younger nursing home residents, Congress passed §1396p(d)(4)(A), enabling income and resources to be held in trust for persons with disabilities under age 65 to provide for some of their needs not met by the nursing home. Patti continues her pursuit of this case requesting a writ of certiorari, not only on her own behalf, but to protect a class of persons with disabilities under the age of 65 who are similarly situated. These young persons with disabilities throughout the United States have plans, hopes and aspirations just as those young persons without disabilities.

This Court in *Olmstead v. Zimring*, 527 U.S. 581, 601 (1999), addressed discrimination against persons with disabilities reasoning that "...confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts,

work options, economic independence, educational advancement, and cultural enrichment." The Court also reasoned that in order to receive medical services, persons with disabilities often must "relinquish participation in community life." *Id.* (Emphasis added.) The nursing home is where most of Patti's physical needs are met. She has a roof over her head, a bed to sleep in and meals to eat. People in prison enjoy these same benefits and more. But, "existing" is not "living," and living with independence, self-esteem and self-worth requires more than regular nursing home care covered by Medicaid. Thus, Congress established the protections for income and resources in (d)(4)(A) Trusts for persons with disabilities for the important purpose of allowing those under 65 to live and not just exist. Patti requests that this Court make these protections a reality for her and other young persons with disabilities.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,
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No. 04-6002

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

June 14, 2005, Filed

PATTI L. REAMES,

Plaintiff - Appellant,

v.

STATE OF OKLAHOMA, *ex rel.* OKLAHOMA HEALTH CARE AUTHORITY; OKLAHOMA DEPARTMENT of HUMAN SERVICES; MICHAEL FOGARTY; HOWARD HENDRICK,

Defendants - Appellees.

THE ASSOCIATION FOR COMMUNITY LIVING, INC.,

Amicus Curiae.

Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. No. CIV-02-1773-H)

Lee M. Holmes, Holmes, Holmes & Neisent, P.L.L.C., Oklahoma City, Oklahoma, (Tracy Speck Neisent, Holmes, Holmes & Neisent, P.L.L.C., Oklahoma City, Oklahoma with him on the briefs) for the Appellant.

Andrew Tevington, Assistant Attorney General, State of Oklahoma, Oklahoma City, Oklahoma, (Travis Smith, Assistant General Counsel, Oklahoma Department of Human Services, Oklahoma City, Oklahoma, with him on the briefs), for the Appellees.

Before **LUCERO** and **McCONNELL**, Circuit Judges, and **ANDERSON**, Senior Circuit Judge.

LUCERO, Circuit Judge.

Patti Reames, a Social Security recipient, appeals the lower court ruling that the Oklahoma Department of Human Services did not violate federal law when it determined that she cannot use a federal statutory "special needs trust" to prevent Oklahoma from taking her Social Security income as Medicaid co-pay. Because we conclude that Oklahoma is not acting contrary to Congressional intent, we **AFFIRM**.

I

Reames is a 51-year-old disabled inhabitant of an Oklahoma nursing home whose only income is from monthly Social Security Disability ("SSD") benefits payments she has received since her disability more than five years ago. Almost all of the monthly benefit is

paid as co-pay to her nursing home under Oklahoma Medicaid rules. In an attempt to keep Oklahoma from using her check as co-pay, on February 26, 2002, Reames' mother created a Special Needs Trust as authorized by 42 U.S.C. 1396p(d)(4)(A). Enacted in 1993 as part of Congress's revision of how trusts were treated under Medicaid, this section enables the "assets" of a disabled individual under the age of 65 to be contributed to a Special Needs Trust for her benefit without having such assets treated as countable assets for Medicaid purposes.[1] The day after the creation of the (d)(4)(A) trust, Reames assigned her monthly SSD check to the trust through direct deposit.

In April, 2002, Reames applied to the Oklahoma Department of Human Services ("OKDHS"), the state agency that determines Medicaid eligibility and disbursement, requesting that Medicaid pay for her nursing-home care. In June, her application was approved, effective retroactively to when her assets had been placed in the trust, but OKDHS took account of Reames' SSD in its determination of her co-pay, and the notice of approval thus required her to pay $796 of her $846 check to the nursing home every month. This determination is in accordance with Medicaid regulations that require states to take Social Security income into account for purposes of establishing the amount of beneficiaries' co-pay. Reames filed an administrative appeal, an administrative hearing was held, and a Fair Hearing Decision was issued affirming the co-pay calculation. Another administrative appeal

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[1] The beneficiaries of such trusts can have no direct control over the funds contained therein, and all the Medicaid funds they receive over the course of their lives have to be repaid out of the trust upon their deaths.

was filed to the Director of OKDHS, who also upheld the co-pay determination.

Her administrative remedies thus having been exhausted, Reames filed suit in district court against OKDHS, the Oklahoma Health Care Authority ("OCHA"), OKDHS Director Headrick and OHCA Chief Executive Officer Fogarty, arguing that the (d)(4)(A) trust statute on its face both protects the SSD benefits she assigned to the trust from being taken into account by Oklahoma in its co-pay determination, and supercedes any state or federal Social Security or Medicaid regulations. Reames sought three kinds of relief: 1) a declaration that defendants' method of computing her Medicaid benefits is illegal, 2) injunctive relief enjoining defendants from considering the disability income placed in the trust in determining her Medicaid benefits, and 3) an order requiring defendants to restore to plaintiff the amounts she asserts have been wrongfully applied toward the cost of her nursing-home care (despite her assertion that she "does not seek a money judgment against the state"). Based in part on sovereign immunity determinations and in part on the perceived compatibility of Oklahoma's Medicaid scheme with the federal legal and regulatory framework, the district court affirmed Oklahoma's administrative determinations and dismissed the suit. Reames now appeals the district court decision.

II

In its Eleventh Amendment analysis, the district court let Reames' suit for declaratory and injunctive relief against all defendants move forward, and dismissed any claims she made for retroactive compensatory relief. This court reviews de novo a district court's Eleventh Amendment immunity

determination. Lewis v. N.M. Dep't of Health, 261 F.3d 970, 975 (10th Cir. 2001).

The Eleventh Amendment provides that "the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . . ." U.S. Const. amend. XI. This Amendment precludes not only actions in which the state is directly named as a party, but also actions brought against a state agency or state officer where the action is essentially one for recovery of money from the state treasury. Edelman v. Jordan, 415 U.S. 651, 677 (1974) (barring any "retroactive award which requires the payment of funds from the state treasury" and limiting the federal courts to providing only "prospective injunctive relief" against state officials sued in their official capacity).[2] However, the possibility - indeed, even the "inexorability" - that a court's ruling may ultimately lead to the payment of state funds does not necessarily transmute the relief at issue into an impermissible award of damages. See Quern v. Jordan, 440 U.S. 332, 347 (1979).

Nevertheless, if the relief sought only requires state expenditures pursuant to a court order requiring a change in state conduct, the Eleventh Amendment will not ordinarily preclude actions brought against the state. For example, in Milliken v. Bradley, 433 U.S. 267 (1977), the Supreme Court held that a Sixth Circuit

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[2] State officials sued in their official capacity for prospective relief are "persons" for purposes of § 1983; such suits are not treated per se as suits against the state, even though relief will come from the state fisc. Will v. Michigan Dept. of State Police, 491 U.S. 58, 71 n.10 (1989).

order requiring defendants to implement remedial education programs as an adjunct to desegregating the Detroit public school system did not violate the Eleventh Amendment. Because the expenditure was ancillary to the defendants' compliance in the future with the court's order to "conform their conduct to requirements of federal law," ordering the necessary expenditure of funds for the programs was within the federal courts' remedial powers. Id. at 289.

Reames' case is more analogous to Edelman than to Milliken because it is easy to distinguish the remedy for past misinterpretations of federal law (reimbursement for co-pays already paid) from the remedy for future ones (ordering Oklahoma prospectively to cease taking a co-pay). Retroactive benefits cannot therefore be seen as an adjunct of a court-ordered prospective relief, but could only constitute redress for past violations of federal law. As such, and because the funds not disbursed to Reames are intermingled in the state fisc, retroactive benefits paid to Reames would be indistinguishable from damages. Edelman squarely holds that such relief is outside the remedial power of the federal courts, as contrasted with "prospective declaratory and injunctive relief," which may be subject to exception from the sovereign immunity doctrine. Edelman, 415 U.S. at 666 n.11 (1974). Therefore, OKDHS and OCHA are entitled to immunity from suit insofar as Reames seeks retroactive benefits.

The Eleventh Amendment does not prevent plaintiffs from bringing suits against state officials like Hendrick and Fogarty in their individual and personal capacities. Scheuer v. Rhodes, 416 U.S. 232, 237-38 (1974). However, it is unclear whether Reames sues Hendrick and Fogarty in their individual or in their

official capacity. In Kentucky v. Graham, 473 U.S. 159, 167 n.7 (1985), the Supreme Court recognized that while a complaint may not always clearly specify whether state officials are sued personally or officially, the "course of proceedings" will usually indicate the nature of the suit. Reames has consistently directed all of her arguments to the actions of OKDHS and OCHA, taken through its agents Hendrick and Fogarty. At no time did she seek to impose liability on Hendrick or Fogarty independent of the actions of their agencies. Reames has treated this lawsuit from its inception as a suit against the state, premised upon the actions of its agents, and therefore money damages are barred under the Eleventh Amendment.

On this basis, the district court properly granted defendants' motion to dismiss on grounds of immunity insofar as it addressed the defendants' potential liability for restoring to Reames the amounts she asserts have been wrongfully applied toward the cost of her nursing-home care. The trial court also correctly denied the motion insofar as she sought prospective declaratory and injunctive relief.

III

A district court's review of agency action is a question of law that we review de novo. Public Lands Council v. Babbitt, 167 F.3d 1287, 1293 (10th Cir. 1999).

The dispute between Reames and the state of Oklahoma stems from the fact that the Special Needs trust generally authorizes protection of assets, including income, from Medicaid determinations, whereas state and federal Medicaid regulations mandate that states take income into account in determining co-pay. Section (d)(4)(A) enables disabled individuals under age 65 to contribute "assets" to a Special Needs Trust for their benefit without having

such assets treated as countable assets for Medicaid purposes. Section 1396p(e)(1) defines "assets" as "all income and resources of the individual." For Medicaid-determination purposes, "the term 'income' has the meaning given . . . in section 1382(a) of this title." 42 U.S.C. 1396p(e)(2). Section 1382(a) defines income to include benefits. Therefore, following the statutory definitions and cross-references, it follows that (d)(4)(A) authorizes the benefits of an individual to be contributed to a Special Needs Trust. On the other hand, the federal regulation governing Medicaid co-pay mandates that a state agency must reduce its payments to the institution in an amount equal to the institutionalized Medicaid recipient's income. 42 C.F.R. 435.733.[3] Social Security regulations mandate that unearned income be counted at the moment it is received. 20 C.F.R. 416.1123(a). Therefore, federal Medicaid regulations mandate that states take income into account in determining co-pay at the time it is received by the individual. Oklahoma purports to comply with the requirements of both the Special Needs Trust statute and federal Medicaid regulations by counting income placed in the trust for purposes of determining co-pay, but allowing such income to be protected for purposes of determining an individual's eligibility for Medicaid to begin with, a compromise Reames maintains is precluded by federal law.

To resolve these conflicting mandates, we begin our inquiry with Oklahoma's implementation of federal

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[3] Reames argues that because the Social Security Administration issued § 435.733 prior to Congress's creation of (d)(4)(A) trusts, the regulation is outdated. However, failure to issue new regulations could also indicate contentment with the current statutory/regulatory scheme.

regulations governing the administration of its Medicaid program. Oklahoma sets forth its policies for administering Medicaid benefits in its State Medicaid Manual ("SMM"). Relevant to the present inquiry, § 3259.7(B)(1)[4] of the SMM ends with the instruction, "For a detailed discussion of how these policies apply to income placed in an exempt trust for a disabled individual, see subsection C [covering Miller trusts]." Section 3259(C), in turn, says,

> "Income placed in a Miller trust is income for SSI purposes although it is not counted as available in determining Medicaid eligibility. Thus, such income is also subject to the post-eligibility rules. Because income placed in a Miller trust is income as defined by SSI (although it is not counted for Medicaid eligibility purposes), all income placed in a Miller trust is combined with countable income not placed in the trust for post-eligibility purposes."
>
> SMM 3259.7(C)(5)(b) (emphasis added).

The SMM also reflects 42 C.F.R. 435.733, which requires states to reduce their Medicaid payments in an amount equal to a recipient's income. Therefore, it would seem that OKDHS faithfully executes these provisions: the agency honors (d)(4)(A) trusts for eligibility determinations, but it does not acknowledge that the trusts apply to co-pay determinations.

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[4] The regulation is in the section on "Pooled Trusts," but explicitly says that its dictates apply equally to (d)(4)(A) Special Needs Trusts.

Reames maintains that OKDHS's consideration of income deposited in her trust and subsequent reduction of the amount of her Medicaid payments is invalid because it conflicts with 42 U.S.C. 1396p(d)(1), which states that "for purposes of determining an individual's eligibility for, or amount of benefits under a State plan under this subchapter," the general rule is to count money in a trust - "subject to [section (d)(4)(A)]." (emphases added) Under Medicaid trust law, Reames argues, the (d)(4)(A) protections apply for purposes of determining co-pay just as much as for determining eligibility.

In order to conclude that the Special Needs Trust, in conjunction with 1396p(d)(1), permits us to invalidate the SMM, we would have to conclude that the state agency's policy is in conflict with the purposes of federal law clearly expressed by Congress in these statutes. Because the pastiche of references and incorporations required to do so is so haphazard and complex, we cannot conclude that Congress, in passing 1396p(d)(4)(A) and 1396p(d)(1), has addressed itself to the precise question at hand: whether a state must ignore federal benefits individuals place in a (d)(4)(A) trust for purposes of determining the amount of their state Medicaid benefits.

The degree of deference this court owes to state agency action is not clearly defined. State agencies are not subject to "notice and comment" requirements, as federal agencies generally are. Notice and comment is in part the basis for judicial deference to federal agency action. See Tax & Accounting Software Corp. v. United States, 301 F.3d 1254, 1260 (10th Cir. 2002). Therefore, "to the extent the State Medicaid Manual conflicts" with even the "purposes" of a federal statute, "we do not follow it." Ramey v. Reinertson, 268 F.3d

955, 963 (10th Cir. 2001) (emphasis added). To determine whether to give effect to state regulation, Chevron's questions are helpful, but not necessarily dispositive. Chevron first asks if Congress has spoken on the precise question at issue. Chevron U.S.A., Inc. v. National Res. Def. Council, 467 U.S. 837, 842-43 (1984) (employing the traditional tools of statutory construction). Specific Congressional intent is law and must be given effect. Id. at 843 n.9. Under Chevron's second step, the court must defer to the agency's interpretation so long as it is "reasonable" and "based on a permissible construction of the statute."" Id. at 843.

Oklahoma gives effect to the clear intent of Congress, expressed in 1396p(d)(1), that once money is actually in the trust, it is given absolute protection both for eligibility and "amount-of" determinations. SMM 3259.7(B)(1) provides that "income does not count . . . as income received by the individual" when the right to the income "actually belongs to the trust and not the individual." Thus, Oklahoma, in accordance with 1396p(d)(1), recognizes that (d)(4)(A) can protect income that 42 C.F.R. 435.733 would seem to mandate the state take into account for co-pay determinations. It simply tries to give effect to the federal regulation as well, by taking into account for co-pay determinations SSD benefits that pass through the beneficiary's hands before arriving at the trust. The question before us is whether Congress meant to preclude the distinction Oklahoma makes between Social Security income placed in a trust and Social Security income directly assigned.[5]

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[5] Reames purports to have assigned her SSD benefits check to the trust such that it actually "belongs to the trust," but OKDHS takes the benefits income into account because it deems the

As discussed above, Congress did not specify whether it intended that (d)(4)(A) protect only assigned income; (d)(4)(A) itself speaks only of "assets," and the Medicaid "definitions" section defines "assets" as "all income and resources of the individual." 42 U.S.C. 1396p(e)(1). A different subsection altogether, not referred to by (d)(4)(A) or 1396(p)(e)(1), provides that for Medicaid-determination purposes, "the term 'income' has the meaning given . . . in section 1382a of this title." 42 U.S.C. 1396p(e)(2).

Section 1382(a), in turn, has nothing specifically directed toward Medicaid regulations; it is a set of Social Security governing statutes. The incorporation of Social Security law is based on Medicaid's complex eligibility rules, which provide that "the methodology to be employed in determining eligibility shall be no more restrictive than the methodology which would be employed under" whatever program to which the applicant is most closely "related." 42 U.S.C. 1396(a)(10)(C)(i)(III). In the end, 1382(a) includes government benefits in the definition of income, and 1396p(d)(1) indirectly endorses treating money in a Special Needs Trust the same for both eligibility and "amount-of" determinations. Yet, given the tortured concatenation of United States Code provisions required to arrive at the conclusion that these federal

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assignment void by law. The actual validity of the transfer gains salience later in our analysis, but if Congress specifically intended that income belonging to the trust be treated the same as income belonging to the individual, we need not reach the question of whether the assignment was valid because 1396p(d)(1) would mandate that the income be protected for "amount-of" determinations either way.

laws preclude Oklahoma's regulatory scheme and its straightforward implementation of 42 C.F.R. 435.733, requiring states to reduce their Medicaid payments in an amount equal to a recipient's income, it would be implausible at best to conclude that Congress so intended.

We also cannot say that the SMM is "unreasonable" or based on an "impermissible construction" of the Congressionally mandated statutory scheme. The SMM provides for full (d)(4)(A) protection to all those who would use it to protect income received from sources other than Social Security, and attempts to effectuate both federal law and federal regulation even for that narrow class of disabled individual. See Chevron, 467 U.S. at 843. Given all these factors, we conclude that the SMM does not conflict with the "purposes" of federal law, and we therefore follow it. See Ramey, 268 F.3d at 963.

IV

Therefore, 1396p(d)(1) only gives (d)(4)(A) shelter to Reames' benefits check if the income does not pass through her hands.[6] See SMM 3259.7(B)(1). This is Reames' argument in the alternative. Given that the SMM is valid, the only way around it is to assign her SSD check directly to the (d)(4)(A) trust, thereby protecting it for "amount-of" Medicaid determinations

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[6] Unless it is irrevocably assigned, which it is not. A Note to SMM 3259.7(C)(5)(b) clarifies that the eligibility/post-eligibility distinction applies "only to those situations in which an individual first receives income and then places it into a Miller trust. It does not apply to situations in which an individual has irrevocably transferred his or her right to receive income to the trust." Counsel conceded at oral argument that Reames could reassign the Social Security check to her own name at any time.

as provided for by SMM 3259.7(B)(1). The dispositive question in this case is therefore whether the law permits Reames to assign her income to the trust. After an in-depth study of the relevant statutes and caselaw, we conclude that it does not.

To convert her benefits check into "trust assets" by preventing it from passing through her hands, Reames assigned it by direct deposit to the Special Needs Trust. This assignment fails because it is barred by Social Security law.

> The right of any person to any future [Social Security] payment . . . shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this title shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

42 U.S.C. 407(a). Section 407, which governs payment of Social Security benefits, mandates that "the right of any person to any future payment under this title [42 USCS § § 401 et seq.] shall not be transferable or assignable." OKDHS argues that because this statute prevents Reames from assigning her SSD benefits, Medicaid should not give effect to her invalid action and should treat the SSD money as if it had passed through her hands.

Reames first argues that 407 should not apply to her because her transfer is voluntary. The Ninth Circuit, for example, in Lopez v. Washington Mutual Bank, 302 F.3d 900, 904 (9th Cir. 2002), held that a violation of 407 did not occur because there was "no indication that the plaintiffs did not voluntarily agree to

apply their SSI benefits in such a fashion." Because Reames voluntarily assigned her benefits check to the trust, this reasoning would legitimize the transfer. However, this argument proves too much: the unscrupulous lender or confidante could well convince the beneficiary that it was in the beneficiary's best interest to transfer the check. Were we to adopt a broad reading of the Ninth Circuit's holding, we would eviscerate 407's protections for the gullible and infirm.

Reames next argues that, if we hold that 407 can apply to voluntary assignment, we should not give effect to the plain language of the statute preventing her from assigning her money to her Special Needs Trust. She argues that the clear intent of 407 is to protect the SSD beneficiary and that we should therefore not read it in such a way that defeats that purpose. Indeed, courts have uniformly recognized that the purpose of 407 is to protect Social Security beneficiaries and their dependents from the claims of creditors. See Dionne v. Bouley, 757 F.2d 1344, 1355 (1st Cir. 1985); Fetterusso v. New York, 898 F.2d 322, 327 (2d Cir. 1990); Dept. of Health and Rehabilitative Servs. v. Davis, 616 F.2d 828, 831 (5th Cir. 1980); Mason v. Sybinski, 280 F.3d 788, 793 (7th Cir. 2002).

These cases all chose to overlook the statute's plain language in order not to defeat Congress's intent in either 407 or other provisions of the Social Security code. The Eleventh Circuit noted in Citronelle-Mobile Gathering, Inc. v. Watkins, 934 F.2d 1180, 1192 (11th Cir. 1991), that "neither the purpose of the benefits, nor the purpose of . . . [the special rule in question], is accomplished by barring Florida from reimbursement." Citronelle, 934 F.2d at 1192 (citation omitted). Accord Mason, 280 F.3d at 793 (refusing to apply 407 where "Congress and the Social Security Administration saw

fit to allow state hospitals to act as representative payees"). Although we acknowledge that the statute was probably not drafted with Reames' situation in mind, we cannot ignore the plain language of the statute, which expressly forbids assignment of Social Security benefits.

Furthermore, distinguishing the case at bar is the fact that the joint application of (d)(4)(A) and 407 does not necessarily lead to the application of no law at all, as the joint application of the conflicting Social Security laws in the cases above would have done. See, e.g., Mason, 280 F.3d at 493 (concluding that "Congress allowed state hospitals to act as representative payees when certain safeguards were met," and that the system could not stand if 407 were applied strictly). Similarly, Reames argues that to apply 407 to SSD checks assigned to a (d)(4)(A) Trust would render (d)(4)(A) a nullity, permitting the government to give and then immediately take away. It would also, she claims, defeat the purpose of 407. Neither assertion is true. The assets of disabled people under 65 still have the full protection of (d)(4)(A) to the extent that the protection does not conflict with the narrow carve-out created by 407.[7] The fact that this so deeply affects Reames' narrow subclass of Special Needs trust beneficiary does not take away from the non-nullity of (d)(4)(A) to those individuals who protect assets they

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[7] Reames asserts that we should ignore 407's proscription because of the canon of statutory construction that more specific statutes predominate over more general statutes in conflict. Such determinations can frequently be flipped. In this case, we are hard-pressed to see why 407, prohibiting one particular disposition of one particular government benefit, is less specific than 42 U.S.C. 1396p(d)(4)(A).

had prior to setting up the trust, inherited assets, or assets from settlements compensating them for their disabling injuries. Similarly, 407 continues to protect Reames and all other Social Security beneficiaries and their dependents from the claims of creditors. To tinker with that scheme could open the door for a loss of protection down the road.

Despite both sides' use of the word "conflict," the 407 issue does not truly present a conflict in the sense that one statute or regulation permits something barred by the other. Nothing in 1396p(d)(4)(A) addresses the assignment of Social Security benefits, or assignment at all. That Reames is caught in the pinch between these two statutes is unfortunate and could be remedied statutorily, but this court has held that "[u]nless the plain language of the statute would produce a result demonstrably at odds with the intention of its drafters, the court must give effect to the clear meaning of the statute as written." Starzynski v. Sequoia Forest Indus., 72 F.3d 816, 820 (10th Cir. 1995). Accordingly, we **AFFIRM** the lower court's determination that Oklahoma acted correctly in taking Reames trust assets into account when determining her nursing home co-pay.

(any footnotes trail end of document)
NO. CIV-02-1773-HE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
PATTI L. REAMES,
Plaintiff,

vs.

STATE OF OKLAHOMA, ex rel. OKLAHOMA HEALTH CARE AUTHORITY AND OKLAHOMA DEPARTMENT OF HUMAN SERVICES, et al.,
Defendants.

ORDER

On July 17, 2003, the Court conducted a non jury trial of the issues involved in this case.[1] The parties submitted post-trial briefs which the Court has considered. Having fully considered the evidence offered and the most recent arguments of the parties, the Court finds in favor of the defendants.

Plaintiff is a disabled individual now residing in a nursing home facility.[2] Her sole source of income is indicated to be Social Security disability payments. Plaintiff sought, and was determined to be eligible for, Medicaid benefits. In determining the amount of Medicaid assistance to be paid to the nursing home facility, the defendants considered plaintiff's monthly disability payments as countable income, thus reducing the amount Medicaid pays to the facility. In effect, defendants' benefit determination resulted in a required "co-pay" by plaintiff to the nursing home

facility of substantially all of her monthly disability payment.[3]

Upon plaintiff's entry into the nursing home facility, a "Special Needs Trust" (SNT) was created for her benefit pursuant to 42 U.S.C. § 1396p(d)(4)(A). After the SNT was created, plaintiff arranged for her monthly disability payments to be deposited into the SNT.[4] Based on this arrangement, plaintiff considered the disability payments which had been placed in the SNT to be exempt from the defendants' post-eligibility rules for income. She therefore protested the defendants' computation of her Medicaid benefits through various review procedures. A final determination rejecting plaintiff's claim was made by defendant Hendrick, Director of the Oklahoma Department of Human Services (OKDHS).[5]

In this case, plaintiff asserts that the actions of the defendants, in considering her disability payments for Medicaid benefit computation purposes, were contrary to the applicable law and regulations and illegally reduced the benefits to which she is entitled. She seeks a declaration that defendants' method of computing her Medicaid benefits is illegal and an order enjoining defendants from considering the disability income placed in the SNT in determining her Medicaid benefits.[6]

In her most recent brief to the Court, plaintiff again argues that the assets in her SNT, specifically her disability income from the Social Security Administration, are exempt from the rules pertaining to the treatment of trust income in 42 U.S.C. §1396p(d). Plaintiff also reasserts her argument that the

provisions of the Oklahoma Medicaid manual pertaining to post-eligibility treatment of income do not apply to trusts like the one she has established. The Court addressed and rejected these same arguments in its order denying plaintiff's request for a preliminary injunction. See Order of Feb. 24, 2003, pp. 6-9. Specifically, the Court found, based on the applicable law and federal regulations,[7] that an individual's income, even though excluded in the process of determining Medicaid eligibility, must nevertheless be considered when determining the amount of Medicaid benefits. Order, pp. 7-8. The Court also found that Oklahoma's application of the federal regulations to trust income was not inconsistent with federal law. Order, pp. 8-9. The parties have presented no basis for altering the Court's conclusion that, in spite of plaintiff's monthly transfer of funds into the SNT, her Social Security disability payments are countable as income for purposes of determining the amount of her Medicaid benefits.

In an attempt to avoid the application of the post-eligibility rules to her disability payments, plaintiff states that she has now irrevocably assigned her income stream to the trust.[8] Plaintiff argues that this assignment converts her disability payments into the property of the trust rather than her personal property. As a result of this conversion, plaintiff claims that Oklahoma's post-eligibility rules do not apply in her case.[9] Defendants argue that plaintiffs assignment does not effect the applicability of the post-eligibility rules because the assignment is prohibited by 42 U.S.C. § 407(a).[10] The Court concludes defendants' position is well taken and that the disability payments placed in

the SNT continue to be subject to the post-eligibility rules for treatment of income.

Plaintiff's present effort to convert her monthly disability payments into resources of the trust, rather than her own personal resources, runs afoul of § 407's provisions. By irrevocably assigning her disability payments to the trust, plaintiff is attempting to presently assign her right to a future income stream. This type of assignment is specifically prohibited under the first clause of § 407(a) ("The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity . . ."). While plaintiff appears to concede this fact, she argues that, because her assignment is voluntary, § 407's prohibition should not apply. However, the provisions of § 407 are not limited to involuntary assignments or transfers. See, e.g., Ellender v. Schweiker, 575 F.Supp. 590, 599 (S.D.N.Y. 1983) (finding that section 407 prohibits voluntary as well as involuntary transfers or assignments). Because plaintiff's attempt to assign her rights to future benefits is ineffective under § 407, she cannot avoid the application of the post-eligibility rules to the income in her SNT.[11]

For the reasons stated here and in the Court's previous order, the Court concludes the defendants' method of computing plaintiff's Medicaid benefits is not contrary to the applicable law and regulations and does not illegally reduce the Medicaid benefits to which the plaintiff is entitled. Accordingly, plaintiff's requests for declaratory and injunctive relief are denied.

IT IS SO ORDERED.

Dated this 3rd day of December, 2003.

Joe Heaton
United States District Judge

Footnotes

[1]*The Court previously conducted a preliminary injunction hearing on February 14, 2003. Plaintiff's request for a preliminary injunction was denied by the Court by order dated February 24,2003.*

[2]*As noted by the Court in the order denying plaintiff's request for a preliminary injunction, the are few, if any, material factual mattes in dispute. Because the issues to be resolved in this case are legal gather than factual in nature, the Court will merely repeat the factual findings made in its previous order and recite additional facts where necessary.*

[3]*Plaintiffs monthly disability payment is $846.00. Of that, $796.00 is required to be paid to the nursing home facility as the "co pay. "*

[4]*Plaintiff has since altered this arrangement by executing an irrevocable assignment of her right to receive the monthly disability payments to the SNT. The effectiveness of the attempted assignment is discussed below.*

[5]*The Oklahoma Medicaid program is administered by the Oklahoma Health Care Authority (OKHCA). By contract, the responsibility for making eligibility determinations has been delegated to OKDHS.*

[6]*Plaintiff also sought an order requiring defendants to restore past amounts wrongfully applied toward the cost of her nursing home care. The Court previously concluded that this claim for relief was barred by the Eleventh Amendment as it was legal in nature, sought recovery of amounts plaintiff claimed she had been forced to pay for nursing home care in the past and was plainly retroactive. See Order of Feb. 24, 2003, pp. 3*

[7]*The regulations adopted by the United States Department of Health and Human Services addressing the extent to which an institutionalized person's income must be considered in determining payments to the institution are set out in 42 C.F.R. § 435.733. While these regulations were promulgated before the § 1396p(d)(4)(A) exemption was established, they have not been repealed or amended as a result of the exemption.*

[8]*As this assignment occurred after the Court's denial of a preliminary injunction, its effect on this case has not been previously addressed by the Court.*

[9]*In support of this argument, plaintiff cites section 3259.7 of the Oklahoma Medicaid manual which states, among other things, that an irrevocable transfer of income to a trust should not count as income received by the individual.*

[10]*42 U.S.C. § 407(a) provides:*

The sight of any person to any future payment under this subchapter[Subchapter II - Federal Old-Age, Survivors, and Disability Insurance Benefits] shall not be transferable or assignable, at law or in equity, and

none of the moneys paid or payable or sights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

[11]*Plaintiff also agues that the rule of statutory construction should prevent this Court from applying the "general " provisions of § 407 over the "specific " provisions of § 1396p(d) (4) (A). However, § 407 relates only to the treatment of social security payments, while § 1396p(d) (4)(A) relates to the treatment of income and assets in general when put into a trust. Thus, the rule relied on by plaintiff does not support the result she seeks in this case.*

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November 19, 2002

Lee Holmes
Lee Holmes & Associates
501 N.W. 13th
OKC, O K 73103

re: Patti Reames
Case Number M094412,
Hearing Number H-46965

Dear Mr. Holmes:

As Director of the Oklahoma Department of Human Services (OKDHS), one of my responsibilities is the review of administrative hearing decisions issued by this agency. These reviews are performed at the request of clients and concern their eligibility for benefits from certain OKDHS programs. In the case of Patti Reames, the issue is whether OKDHS acted correctly in counting her Social Security benefits as income when calculating the amount she must pay monthly to the nursing home. After thoroughly reviewing all aspects of this case, I find that the decision was correct.

THE FACTS

On February 26, 2002, a trust was created by Patti Reames' mother, pursuant to OAC 317:35-5-41 (d)(9)(F)(i) and 42 U.S.C. § 1396p(d)(4)(A). Patti Reames is the beneficiary of this trust. Ms. Reames subsequently assigned all of her intangible personal property to the trust, including Social Security benefits.

Patti Reames applied for Medicaid to pay for nursing home care on April 19, 2002. At the time of application, her income consisted of Social Security disability benefits in the amount of $846 per month. On June 19, 2002, the application was approved, effective February 27, 2002. The notice approving her application told her that she had to pay $769 of her income to the nursing home each month.

You filed a request for hearing on June 28, 2002. A hearing was scheduled for July 26, 2002, and postponed to August 15, 2002, at your request. At the hearing you showed that Ms. Reames' only income was Social Security disability payments. She had placed her July 2002 payment into the trust and starting in August 2002, her Social Security check was being deposited directly into a checking account owned by the trust. You asserted that beginning in June 2002, OKDHS could not count the Social Security payment as income when determining the amount she had to pay to the nursing home each month.

On August 29, 2002, a hearing decision was issued in which the Appeals Committee found that DHS had acted correctly in counting Ms. Reames Social Security disability payment as income when calculating the

amount she had to pay the nursing home each month. On September 12, 2002, you requested that I review the Appeals Committee decision.

THE LAW

The first issue is the assignment of Social Security disability benefits to a trust. 42 U.S.C. § 407(a) addresses the assignability of such payments:

The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

The second issue is whether, in the month of receipt, income placed in a trust meeting the requirements of 42 U.S.C. § 1396p(d)(4)(A), or assigned to such a trust, is counted as income when determining a nursing home vendor co-pay. The trust authorized at 42 U.S.C. § 1396p(d)(4)(A) is referred to as a Special Needs Trust or (d)(4)(A) trust. Since the statute makes no reference to the special needs of an individual, this kind of trust will be referred to as a (d)(4)(A) trust.

A (d)(4)(A) trust must contain the assets of a disabled person under 65 years old. 42 U.S.C. § 1396p(e)(1) defines 'assets' as all income and resources of an individual. Paragraph 3259.7 of the State Medicaid Manual, published by the Centers for Medicare & Medicaid Services, says that income placed into a (d)(4)(A) trust shall not be counted as income for

purposes of determining Medicaid eligibility, or for post-eligibility purposes.

ANALYSIS

42 U.S.C. § 407 prohibits the assignment of Social Security disability benefits. OKDHS will therefore treat the assignment by Ms. Reames of her Social Security disability benefits to the (d)(4)(A) trust as void.

This leaves the question of the treatment of Social Security disability benefits placed in the (d)(4)(A) trust in the month of receipt. You cite three cases for the proposition that OKDHS must follow the treatment of income that is described in the State Medicaid Manual. However, the cases you cite each deal with the validity of regulations promulgated pursuant to the federal Administrative Procedures Act (APA) and found in the Code of Federal Regulations. No mention is made in these cases of the State Medicaid Manual, which is not promulgated pursuant to the APA. If CMS wished for the opinion expressed in the State Medicaid Manual to be binding on the states, it would promulgate regulations through the APA process.

The State Medicaid Manual should be treated akin to an unpublished opinion of an appellate court - not controlling but worth whatever persuasive effect it has. In the case of § 3259.7 of the State Medicaid Manual regarding the treatment of income placed in a (d)(4)(A) trust, there is no persuasive effect.

Federal regulation, found at 45 C. F. R. § 435.725(x) requires a state to reduce the payment from Medicaid funds for nursing home care by the amount of the

recipient's income - with deductions for certain items such as personal needs allowance and medical costs. Thus there is a requirement that an individual pay as much of her nursing home expense as she is able. This requirement is made meaningless if the position you assert is accepted.

Federal law limits eligibility for Medicaid payment of nursing home costs to people whose income does not exceed 300% of the current maximum SSI payment to an individual. 42 U.S.C. §§ 1396a(a)(1)(A)(ii)(IV),1396b(F){4}(C). Income may exceed this amount only if the individual places all of her income in a trust established pursuant to 42 U.S.G. § 1396p(d)(4)(B). With a (d)(4)(B) trust, all of the individuals income is either paid to the nursing home, community spouse, retained in the trust for Medicaid repayment, or used for medical expenses. Again, there is a requirement that an individual pay as much of her nursing home expense as she is able. Again, this requirement is defeated if the position you assert is accepted. A disabled person under age 65, who lives in a nursing home, and who has income of $50,000 per month could become eligible for the State of Oklahoma to pay her nursing home costs by assigning her income to her (d)(4)(A) trust. Her trustee could then exhaust the trust with any sort of expenditure for her benefit, thus defeating Medicaid recovery.

CONCLUSION

It is clear that the cost-sharing by Medicaid recipients that is required by feueral law can only be accomplished by counting Ms. Reames' Social Security disability payments as income when determining both her eligibility for Medicaid and, once she is found eligible, the amount

that she must pay monthly to the nursing home. Accordingly, I find that DHS acted correctly in setting the amount of Ms. Reames' co-payment found in the June 19, 2002, notice.

If you disagree with my decision, Title 56 Oklahoma Statutes, Section 168 gives you the right to pursue judicial review by filing a petition in the district court for the county in which you live within thirty days of this decision.

Very truly yours,
Howard H. Hendrick, Director
Department of Human Services

No. 04-6002

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

June 14, 2005, Filed

PATTI L. REAMES,

Plaintiff - Appellant,

v.

STATE OF OKLAHOMA, *ex rel.* OKLAHOMA HEALTH CARE AUTHORITY; OKLAHOMA DEPARTMENT of HUMAN SERVICES; MICHAEL FOGARTY; HOWARD HENDRICK,

Defendants - Appellees.

THE ASSOCIATION FOR COMMUNITY LIVING, INC.,

Amicus Curiae.

ORDER

Filed September 26, 2005

Before **LUCERO** and **McCONNELL**, Circuit Judges, and **ANDERSON**, Senior Circuit Judge.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that the petition is also denied.

Entered for the Court

CLERK, COURT OF APPEALS

by: *s/Lisa Gailegos*

Deputy Clerk

APPENDIX C - DIST CT ORDER

Attached in pdf format

3259.7 Exceptions to Treatment of Trusts Under Trust Provisions.--The rules concerning treatment of trusts set forth in §3259.6 do not apply to any of the following trusts, i.e., the trusts discussed below are treated differently in determining eligibility for Medicaid. Funds entering and leaving these trusts are generally treated according to the rules of the cash assistance programs, the State's more restrictive rules under §1902(f) of the Act, or more liberal rules under §1902(r)(2) of the Act, as appropriate.

As is noted in each exception below, one common feature of all of the excepted trusts is a requirement that the trust provide that upon the death of the individual, any funds remaining in the trust go to the State agency, up to the amount paid in Medicaid benefits on the individual's behalf. When an individual has resided in more than one State, the trust must provide that the funds remaining in the trust are distributed to each State in which the individual received Medicaid, based on the State's proportionate share of the total amount of Medicaid benefits paid by all of the States on the individual's behalf. For example, if an individual received $20,000 in Medicaid benefits in one State and $10,000 in benefits in another State, the first State receives two-thirds of the amount remaining in the trust, and the second State receives one-third, up to the amount each State actually paid in Medicaid benefits.

A. Special Needs Trusts.--A trust containing the assets of an individual under age 65 who is disabled (as defined by the SSI program in §1614(a)(3) of the Act) and which is established for the sole benefit of the individual by a parent, grandparent, legal guardian of

the individual, or a court is often referred to as a special needs trust. To qualify for an exception to the rules in this section, the trust must contain a provision stating that, upon the death of the individual, the State receives all amounts remaining in the trust, up to an amount equal to the total amount of medical assistance paid on behalf of the individual under your State Medicaid plan. In addition to the assets of the individual, the trust may also contain the assets of individuals other than the disabled individual.

When a trust is established for a disabled individual under age 65, the exception for the trust discussed above continues even after the individual becomes age 65. However, such a trust cannot be added to or otherwise augmented after the individual reaches age 65. Any such addition or augmentation after age 65 involves assets that were not the assets of an individual under age 65. Thus, those assets are not be subject to the exemption discussed in this section.

To qualify for this exception, the trust must be established for a disabled individual, as defined in §1614(a)(3) of the Act. When the individual in question is receiving either title II or SSI benefits as a disabled individual, accept the disability determination made for those programs. If the individual is not receiving those benefits, you must make a determination concerning the individual's disability. In making this determination, follow the normal procedures used in your State to make disability determinations for Medicaid purposes. If you are a 209(b) State, you must use the disability criteria of the SSI program, rather than any more restrictive criteria you may use under your State plan. The only exception to this

requirement is if you had a more restrictive trust policy in general in 1972 than the policy described in §§3259ff. If so, you may use any more restrictive definition of disability which applied to that 1972 policy. If not, you must use the disability criteria of the SSI program.

NOTE: Establishment of a trust as described above does not constitute a transfer of assets for less than fair market value if the transfer is made into a trust established solely for the benefit of a disabled individual under age 65. However, if the trust is not solely for the benefit of the disabled person or if the disabled person is over age 65 transfer penalties may apply. (See §3258.10 for the exceptions to imposing penalties for certain transfers of assets.)

B. Pooled Trusts.--A pooled trust is a trust containing the assets of a disabled individual as defined by the SSI program in §1614(a)(3) of the Act, that meets the following conditions:

o The trust is established and managed by a non-profit association;

o A separate account is maintained for each beneficiary of the trust but for purposes of investment and management of funds the trust pools the funds in these accounts;

o Accounts in the trust are established solely for the benefit of disabled individuals by the individual, by the parent, grandparent, legal guardian of the individual, or by a court (see §3257 for a definition of the term "solely for the benefit of"); and

o To the extent that any amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State the amount remaining in the account up to an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under your State Medicaid plan. To meet this requirement, the trust must include a provision specifically providing for such payment.

To qualify as an excepted trust, the trust account must be established for a disabled individual, as defined in §1614(a)(3) of the Act. When the individual in question is receiving either title II or SSI benefits as a disabled individual, accept the disability determination made for those programs. If the individual is not receiving those benefits, you must make a determination concerning the individual's disability. In making this determination, follow the normal procedures used in your State to make disability determinations for Medicaid purposes. If you are a 209(b) State, you must use the disability criteria of the SSI program. The only exception to this requirement is if you had a more restrictive trust policy in general in 1972 than the policy described in this instruction. If so, you may use any more restrictive definition of disability which applied to that 1972 policy. I f not, you must use the disability criteria of the SSI program.

NOTE: Establishing an account in the kind of trust described above may or may not constitute a transfer of assets for less than fair market value. For example, the transfer provisions exempt from a penalty trusts established solely for disabled individuals who are under age 65 or for an individual's disabled child.

As a result, a special needs trust established for a disabled individual who is age 66 could be subject to a transfer penalty. (See §3258.10 for the exceptions to imposing penalties for certain transfers of assets.)

While trusts for the disabled (as well as Miller trusts described in subsection C) are exempt from treatment under the trust rules described in §3259.6, funds entering and leaving them are not necessarily exempt from treatment under the rules of the appropriate cash assistance program. The following are rules applicable to funds entering and leaving both kinds of exempt trusts for the disabled.

1. Trusts Established with Income.--While most trusts for the disabled are created using the individual's resources, some may be created using the individual's income, either solely or in conjunction with resources. When an exempt trust for a disabled individual is established using the individual's income (i.e., income considered to be received by the individual under the rules of the SSI program), the policies set forth in subsection C for treatment of income used to create Miller trusts apply.

NOTE: The following policies assume that the income placed in the trust is the individual's own income, placed in the trust after he or she receives it. When the right to income placed in the trust actually belongs to the trust and not the individual the income does not count under SSI rules as income received by the individual.

The policies pertaining to treatment of income belonging to the individual include:

o Not counting for eligibility purposes income before it is placed in the trust;

o Application of transfer of assets rules (where a transfer into trust for a disabled individual is not exempt from penalty under the exceptions to the transfer of assets rules explained in §3258.10);

o Application of post-eligibility treatment of income rules to income placed in the trust;

o Counting as income, per cash assistance rules, funds paid out of the trust to or for the benefit of the individual (This rule applies to any payment from an exempt trust, regardless of whether the trust is established using income, resources, or both.); and

o Spousal impoverishment provisions as they apply to exempt trusts.

For a detailed discussion of how these policies apply to income placed in an exempt trust for a disabled individual, see subsection C.

2. Trusts Established with Resources.--When an exempt trust is established for a disabled individual using resources either in whole or in part, those resources are treated as follows.
Resources placed in an exempt irrevocable trust for a disabled individual may or may not count as resources to the individual in determining eligibility, depending on the circumstances. Resources are counted as resources only during those months in which they are in the possession of the individual, up to but not including

the month in which the resources are placed in the trust. Beginning with the month the resources are placed in the trust, they are exempt from being counted as resources to the individual.

Resources placed in an exempt trust for a disabled individual are subject to imposition of a penalty under the transfer of assets provisions unless the transfer is specifically exempt from penalty as explained in §3258.10 or unless the resources placed in the trust are used to benefit the individual, and the trust purchases items and services for the individual at fair market value. See subsection C for the rules concerning application of the transfer of assets provisions to assets placed in an exempt trust. These rules apply to both income and resources placed in the exempt trusts discussed in this section.

C. Miller-Type or Qualifying Income Trusts (QIT).-- This type of trust, established for the benefit of an individual, meets the following requirements:

o The trust is composed only of pension, Social Security, and other income to the individual, including accumulated interest in the trust; and

o Upon the death of the individual, the State receives all amounts remaining in the trust, up to an amount equal to the total medical assistance paid on behalf of the individual under your State Medicaid plan. To qualify for this exception, the trust must include a provision to this effect.

NOTE: HCFA has interpreted §1917(d)(4)(B) of the Act as explained below to avoid reading it as a

nullity. This interpretation applies to those situations in which an individual first receives income and then places it into a Miller trust. It does not apply to situations in which an individual has irrevocably transferred his or her right to receive income to the trust. Under SSI rules, this income is no longer considered to be the individual's income. As a result, a trust established with income the right to which has been transferred to the trust does not meet the requirements for exemption under this section, since the statute requires that a Miller trust be established using the income of the individual.

This type of trust is applicable in your State only if your State Medicaid plan provides Medicaid to individuals eligible under a special income level, as described in §1902(a)(10)(A)(ii)(V) of the Act but does not provide Medicaid for nursing facility services to the medically needy, who are described in §1902(a)(10)(C) of the Act.

To qualify for this exception, the trust must be composed only of income to the individual, from whatever source. The trust may contain accumulated income, i.e., income that has not been paid out of the trust. However, no resources, as defined by SSI, may be used to establish or augment the trust. Inclusion of resources voids this exception.

While Miller trusts (as well as the trusts for the disabled described in subsections A and B) are exempt from treatment under the trust rules described in §3259.6, funds entering and leaving them are not necessarily exempt from treatment under the rules of the appropriate cash assistance program. The following

are rules applicable to funds entering and leaving Miller trusts.

1. Miller Trust Meets All Requirements for Exemption Under §1917(d)(4)(B) of the Act.-- When a trust meets all requirements for exemption, and is irrevocable, the corpus of the trust is exempt from being counted as available to the individual. A revocable trust is exempt under the Miller trust provisions. However, a revocable trust is counted under SSI rules as an available resource to the individual.

2. Income Placed In Miller Trust.-- Income placed in a trust that meets all of the requirements for exemption as a Miller trust meets the SSI definition of income but is not counted in determining the individual's eligibility for Medicaid. Thus, any income, including Social Security benefits, VA pensions, private pensions, etc., can be placed directly into a Miller trust by the recipient of those funds, without those funds adversely affecting the individual's eligibility for Medicaid. Also, income generated by the trust which remains in the trust is not income to the individual.

3. Application of Transfer of Assets Provisions of OBRA 1993.--The transfer of assets provisions described in §§3258ff. apply to funds placed in a Miller trust. Under the transfer of assets provisions, income is considered to be an asset. In placing income in an irrevocable trust, including a Miller trust, an individual gives up direct access to and control over that income. Thus, placement of funds, including income, in a trust can be a transfer of assets for less than fair market value. As such, placing funds in a Miller trust normally

subjects the individual to the penalties provided for under the transfer of assets provisions.

However, transfer of assets penalties do not apply to income placed in a Miller trust to the extent that the trust instrument provides that the income placed in the trust will, in turn, be paid out of the trust for medical care provided to the individual, including nursing home care and care under a home and community-based waiver. When such payments are made, the individual is considered to have received fair market value for the income placed in the trust, up to the amount actually paid for medical care provided to the individual and to the extent that the payments purchased care at fair market value.

Because of certain exemptions from the transfer of assets penalties, funds placed in a Miller trust can be transferred for the sole benefit of a spouse without incurring such penalties. This can include, among other things, payments by the trust for medical care for the community spouse. Section 1917(c)(2)(B) of the Act provides that transfer penalties do not apply to assets transferred to a spouse or to a third party for the sole benefit of the spouse. A trust could be considered a third party for purposes of this transfer exemption. For an individual to avoid the transfer penalty that results from a transfer of property to a trust, the trust must be drafted to require that this particular property can be used only for the benefit of the individual's spouse while the trust exists and that the trust cannot be terminated and distributed to any other individuals or entities for any other purpose.

When payments are made for the individual's medical care you must require that the payments be made at intervals specified by your State (e.g., every month or by the end of the month following the month the funds were placed in the trust). An individual cannot be considered to have received fair market value for funds placed in a trust until payments for some item or service are actually made. Thus, funds cannot be allowed to accumulate indefinitely in a Miller trust and still avoid transfer of assets penalties.

The individual is considered to have received fair market value for funds placed in a Miller trust for any other payments made from the trust which are for the benefit of the individual and which reflect fair payments for any items or services which were purchased. For example, funds placed in the trust can be used to pay the administrative fees of the trust, income tax owed by the trust, attorney's fees which the trust is obligated to pay (in proportion to whatever part of the trust benefits the individual), food or clothing for the individual, or mortgage payments for the individual's home.

When income placed in the trust exceeds the amount paid out of the trust for medical services or other items or services which benefit the individual, the excess income is subject to penalties under the transfer of assets provisions.

It is important to note that, although an individual may not be subject to a transfer penalty if funds he or she transferred to a trust are used by the trustee to make payments that provide fair market value to the individual, these payments from the trust may still

count as income to the individual, as explained in subsection 4.

4. Treatment of Payments Made from Trust.--While Miller trusts are exempt from treatment under the trust provisions described in §3259.6, payments made from these trusts are still subject to the usual rules under the State Medicaid plan. In most States, these are the SSI rules. Any payments made from a Miller trust directly to the individual are counted as income to the individual, provided the individual could use the payments for food, clothing, or shelter for himself or herself. This rule applies whether or not the payments actually are used for these purposes, as long as there are no legal impediments which prevent the individual from using the payments this way.

Any payments made by the trustee to purchase something in kind for the individual also can count as income to the individual. In kind income includes actual food, clothing, or shelter, or something the individual can use to obtain one of these. For example, if the trustee makes a mortgage payment for the individual, that payment is a shelter expense and counts as income.

However, as another example, assume that the trust provides that $500 is paid each month toward the cost of the individual's nursing facility care. Under SSI policy, medical expenses paid on behalf of an individual are not counted as income to the individual. Thus, the $500 in this instance is not considered income.

5. Post-eligibility Treatment of Income.--All of the post-eligibility treatment of income rules in 42 CFR

435.725, 733, 735, and 832, as well as §1924 of the Act, apply in cases involving Miller trusts, as follows.

a. Income Not Placed in a Miller Trust.--Income retained by the individual (i.e., not placed in a Miller trust) is income to the individual, according to SSI policy. Thus, such income is subject to the post-eligibility rules.

b. Income Placed in a Miller Trust.--Income placed in a Miller trust is income for SSI purposes although it is not counted as available in determining Medicaid eligibility. Thus, such income is also subject to the post-eligibility rules.

Because income placed in a Miller trust is income as defined by SSI (although it is not counted for Medicaid eligibility purposes), all income placed in a Miller trust is combined with countable income not placed in the trust for post-eligibility purposes. For example, an individual with $2,000 a month in income retains $1,338 (the maximum currently permitted for eligibility under a special income level) and places the remaining $662 in a Miller trust. The entire $2,000 is income as defined by SSI, although only the $1,338 is counted as income for eligibility purposes. Thus, the $2,000 forms the basis for the post-eligibility computation.

Using the $2,000 as the individual's total income for post-eligibility purposes, the State deducts, as applicable:

o A personal needs allowance;

o Family maintenance allowances, including the spousal and family allowances provided for in §1924 of the Act;

o An allowance for maintenance of a home, if such allowance is included in the State plan; and

o Medical expenses not subject to third party payment.

The remainder is the amount by which the State reduces its payment to the medical institution or for home and community-based waiver services.

c. Payments Made From Miller Trust.--Payments made from a Miller trust to the individual may count for eligibility purposes as income to the individual under SSI rules. However, such payments are not subject to treatment under the post-eligibility rules. Post-eligibility has already been applied to all income entering the trust. Thus, there is no need to consider, for purposes of post-eligibility, payments made from the trust.

6. Miller Trust and Spousal Impoverishment.--As explained in subsection 5, funds placed in a Miller trust are subject to the post-eligibility treatment of income rules, including those applicable to spousal impoverishment in §1924 of the Act.

FILED
JAN 26 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-807

In The
Supreme Court of the United States

PATTI L. REAMES,

Petitioner,

v.

STATE OF OKLAHOMA, *ex rel.* OKLAHOMA HEALTH CARE AUTHORITY; OKLAHOMA DEPARTMENT OF HUMAN SERVICES; MICHAEL FOGARTY AND HOWARD HENDRICK

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR RESPONDENTS OKLAHOMA DEPARTMENT OF HUMAN SERVICES AND HOWARD HENDRICK IN OPPOSITION

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THE PARTIES

Respondents are the state agencies which operate Oklahoma's Medicaid Program and the chief executives of the agencies.

Petitioner, Patti L. Reames, was a Medicaid recipient who lived in a nursing home at all times relevant to this case. Petitioner died on December 27, 2005.

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INTRODUCTION

This case is about Petitioner's attempt to avoid contributing to the cost of her nursing home care, primarily paid for by the Oklahoma Medicaid Program, by placing her Social Security benefits, her only income, into a trust. The Tenth Circuit held that Petitioner could not avoid contributing to the cost of her care by assigning her Social Security benefits to a trust or by placing her benefits into a trust which shelters the assets and income of the trust when determining eligibility for Medicaid.

The Facts

Petitioner was 53 years old when she died on December 27, 2005, four days after her Petition for Writ of Certiorari was filed herein. Before her death she received Social Security disability benefits, authorized by 42 U.S.C. § 423. At all times pertinent to this case she lived in a nursing home in Oklahoma City. Prior to February 26, 2002, Petitioner's Social Security benefits were deposited into a checking account that she owned.

On February 26, 2002, a trust (the Trust) was established by Petitioner's mother, which met the requirements of 42 U.S.C. § 1396p(d)(4)(A). The income and assets of a trust meeting the requirements of 42 U.S.C. § 1396p(d)(4)(A) are not taken into consideration when determining eligibility for Medicaid benefits. 42 U.S.C. § 1396a.

Petitioner then attempted to assign her Social Security benefits to the Trust, in disregard of 42 U.S.C. § 407(a), which says:

> The right of any person to any future payment under this subchapter **shall not be transferable or**

> **assignable**, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

(emphasis added).

The purported assignment was completed by having Petitioner's benefits directly deposited into the Trust. Although the Petition for Writ of Certiorari states that the Social Security Administration deposits Petitioner's benefits directly into an account owned by the Trust, Petitioner failed to explain how this was accomplished. Prior to establishment of the Trust, the Social Security Administration deposited benefits directly into a checking account owned by Petitioner. Following establishment of the Trust, and without notifying the Social Security Administration, ownership of the checking account was changed to the Trust. Petitioner did not notify the Social Security Administration of the attempted assignment or change in ownership of the checking account because, pursuant to its Program Operations Manual System (POMS), the Social Security Administration will not knowingly deposit benefits into an account owned by a trust.

Two months after the Trust was established, Petitioner applied to respondent Oklahoma Department of Human Services for payment of her nursing home care by the Oklahoma Medicaid Program. Her application was approved and, like all other unmarried Medicaid beneficiaries living in a nursing home, was required to apply all but $50 of her income, including Social Security benefits, towards the cost of her care.

Petitioner filed an action in the United States District Court for the Western District of Oklahoma, claiming that she could not be required to use her Social Security benefits to contribute to the cost of her nursing home care, where her basic needs were being met. Petitioner testified in the District Court that she wanted to use her Social Security benefits to eat at Red Lobster; go shopping; go to concerts in Oklahoma City and Dallas; and go on hot air balloon rides. The District Court ruled against her, finding that the Oklahoma Medicaid Program acted legally when it considered her Social Security benefits to be available to contribute to the cost of her nursing home care.

Petitioner then appealed to the Tenth Circuit, making the same claims. In *Reames v. State of Oklahoma*, 411 F.3d 1162 (10th Cir. 2005), the Tenth Circuit found that the attempted assignment of her Social Security benefits was void and the Oklahoma Medicaid Program acted legally when it considered her Social Security benefits to be available to contribute to the cost of her nursing home care.

Petitioner now seeks review of the decision of the Tenth Circuit. Petitioner puts her reasons for the Court to grant a Writ of Certiorari into four groups.

1. 42 U.S.C. § 407(a)

In *Reames v. State of Oklahoma*, 411 F.3d 1162 (10th Cir. 2005) the United States Court of Appeals for the Tenth Circuit correctly held that Petitioner's attempted assignment of her Social Security benefits to a trust violated 42 U.S.C. § 407(a), which forbids assignment of such benefits. The effect of this holding was to thwart Petitioner's attempt to evade the lawful requirement of the Oklahoma

Medicaid Program that she contribute to the cost of her nursing home care.

Petitioner asserts that this portion of *Reames* is in conflict with decisions in four other circuits. However, each of the cases cited by Petitioner deals with the 'legal process' prohibition of 42 U.S.C. § 407(a), not the prohibitions on transfer.

Rather than being in conflict with *Reames*, the cases cited by Petitioner support the Tenth Circuit, stating that the purpose of the 42 U.S.C. § 407(a) protections of Social Security benefits are intended to make sure the recipient can provide for her most basic needs. Since Petitioner's basic needs are met in the nursing home, the purpose of 42 U.S.C. § 407(a) is preserved even though voiding the assignment leaves her Social Security benefits available to contribute to the cost of her care.

2. *Keffeler*

The Tenth Circuit also found that Petitioner could not avoid the lawful requirement of the Oklahoma Medicaid program that she contribute to the cost of her care by placing her Social Security benefits, in the month of receipt, into a trust which meets the requirements of 42 U.S.C. § 1396p(d)(4)(A). The income and assets of a such a trust are not considered when determining eligibility for Medicaid.

Petitioner argues that *Wash. State Dep't of Soc. & Health Servs. v. Keffeler*, 537 U.S. 371, 385 (2003), supports her argument that the anti-assignment prohibition found in 42 U.S.C. § 407(a) only prohibits assignments that are accomplished through court proceedings and,

since there was no court involved in her attempted assignment, there was no statutory bar to assignment. However, *Keffeler* in no way supports Petitioner's argument, which relies on a misapprehension of language in 42 U.S.C. § 407(a) and ignores the applicable rule of statutory construction which forbids construing a statute in a way that makes any part superfluous.

3. *Chevron*

The Tenth Circuit relied on the State Medicaid Manual (SMM) in reaching the conclusion that Petitioner could not avoid the lawful requirement of the Oklahoma Medicaid program that she contribute to the cost of her care by placing her Social Security benefits, in the month of receipt, into a trust which meets the requirements of 42 U.S.C. § 1396p(d)(4)(A). The SMM is a non-APA publication of the HHS Centers for Medicare and Medicaid Services, which advises on the operation of state Medicaid programs. Petitioner argues, incorrectly, that the Tenth Circuit gave undue deference to the SMM in reaching its decision. However, prior cases in this Court allow great weight to be given to the Secretary of HHS when Congress has delegated specific rule-making authority. 42 U.S.C. § 1396a(a)(17) gives specific authority to the Secretary to prescribe standards for States to determine income and assets when determining Medicaid eligibility. The Secretary did so in relation to 42 U.S.C. § 1396p(d)(4)(A) trusts through the SMM. Therefore, the Tenth Circuit acted correctly in relying on the SMM when making its decision.

4. *Olmstead*

Petitioner's final argument is that *Olmstead v. Zimring*, 527 U.S. 581 (1999), is in conflict with *Reames* because Petitioner is kept from getting out of the nursing home and into the community if her Social Security benefits are required to be contributed to the cost of her care.

The *Olmstead* plaintiffs were able, and desirous, of **living** in the community, not visiting it. In contrast, Petitioner is not able to move back home and does not propose to do so. She wants to avoid the legal requirement of contributing to her care so that she can leave the nursing home for short periods. Petitioner's situation simply does not fit any situation contemplated by *Olmstead* and she does not cite any cases to show that *Olmstead* has been extended to cover people in her circumstances.

REASONS FOR DENYING THE WRIT

I. There Is No Circuit Court Conflict Regarding the Anti-assignment Provision of 42 U.S.C. § 407(a).

The anti-assignment provision of 42 U.S.C. § 407(a) says, "The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity." Petitioner asserts that the portion of the decision of the Tenth Circuit in *Reames v. State of Oklahoma*, 411 F. 3d 1162, 1173 (10th Cir. 2005), in which the Court found that the quoted language voided the attempt to assign her Social Security benefits to a trust was erroneous, citing conflicts with four Circuit Courts of Appeal.

Petitioner's argument fails for two reasons. First, as demonstrated below, none of the cases addresses the 'assignment' portion of 42 U.S.C. § 407(a). Second, rather than being in conflict with *Reames*, the cases cited by Petitioner support the Tenth Circuit, stating that the purpose of the 42 U.S.C. § 407(a) protections of Social Security benefits are intended to make sure the recipient can provide for her most basic needs. Since Petitioner's basic needs are met in the nursing home, the purpose of 42 U.S.C. § 407(a) is preserved, even though voiding the assignment leaves her Social Security benefits available to contribute to the cost of her care.

Davis

In *Dep't of Health and Rehabilitative Servs. v. Davis*, 616 F.2d 828 (5th Cir. 1980), the State of Florida, pursuant to state law, filed an action seeking reimbursement for the past care of an incompetent resident of a state facility from his accumulated Social Security and Veteran's Administration benefits held by his guardian. In regard to Social Security benefits, the Fifth Circuit stated that Social Security benefits for disabled were intended to provide for their care and maintenance. Referring to the 'legal process' portion of 42 U.S.C. § 407(a), the Court stated, " . . . this exemption evinces a clear legislative purpose of precluding beneficiaries from diverting their social security payments away from the statute's seminal goal of furnishing financial, medical, rehabilitative and other services to needy individuals." The Court further stated that the incompetent person's benefits were to assure his care and maintenance and the suit by the state sought to apply the benefits for that purpose. *Id.*, at 831. Although this case addresses the 'legal process' provision of

42 U.S.C. § 407(a), it supports the Tenth Circuit, which found that the Oklahoma Medicaid Program acted lawfully in requiring Petitioner to contribute to her own care and maintenance – the same purpose endorsed by the Fifth Circuit.

Fetterusso

In *Fetterusso v. New York*, 898 F.2d 322 (2nd Cir. 1990), the Second Circuit dealt with three involuntary residents of state mental facilities and a New York law which required that they pay for the cost of their care. Each of the residents received Social Security benefits and the state billed the resident, or the resident's payee, for the cost of their care. Billing and payment for each resident took place in different ways:

> Acting as Giardiana's representative payee, the Director of the Kings Park Psychiatric Center deposits Giardiana's social security checks into the patient's hospital account, which the Center's business office debits each month to reflect payment of fees. Acting as representative payee for his brother Frank, Dominick Fetterusso collects appellant's social security benefits and pays the OMH for his brother's care and maintenance. Hofendiener, who does not have a representative payee, deposits his Social Security checks directly into his account at the Mid-Hudson Psychiatric Center, and its business office debits his account each month.

Id., at 324-325. The Second Circuit found that these billing and payment arrangements did not involve legal process and thus did not come within the 'legal process' provision

of 42 U.S.C. § 407(a). The Court did not address the statute's 'assignment' prohibition.

Johnson

That the Oklahoma Medicaid Program may require Petitioner to contribute toward the cost of her nursing home care is made abundantly clear by another Second Circuit case cited by Petitioner, *Johnson v. Wing*, 178 F.3d 611 (2nd Cir. 1999), *cert. denied*, 528 U.S. 1162 (2000). Buelah Johnson was a disabled recipient of Supplemental Security Income (SSI) who lived in emergency housing, funded by Westchester County, which provided food, shelter, and medical care. Pursuant to state law, she was allowed to keep $45 per month for her personal needs and required to pay the rest, including SSI, towards the $3,000 monthly cost of her food, shelter and medical care. *Id.*, at 613.

Ms. Johnson made the payment for a year and then stopped, claiming that the payment requirement violated the 'assignment' and 'legal process' prohibitions found at 42 U.S.C. §§ 407(a) and 1383(d)(1). *Johnson* at 614-615. The Second Circuit found to the contrary, stating:

> . . . the district court specifically found "that Ms. Johnson voluntarily agreed to her placement in emergency housing under the terms and conditions as they were explained to her," *Johnson*, 12 F.Supp.2d at 315, and that "there is no evidence that plaintiff's payment was not voluntary." Id. at 316. Those findings, which we have no reason to disturb, led the district court to a justified reliance on *Fetterusso v. New York*, 898 F.2d 322, 328 (2d Cir.1990), where we said of the appellants, who were individuals committed to mental institutions, that "[t]here is no basis for concluding

> that any of the appellants did not voluntarily agree to the use of their social security benefits to pay the costs of their care and treatment." And if the payment of benefits is voluntary, it does not violate the anti-attachment statute.

Id., at 615.

It is apparent that the Second Circuit uses the word 'voluntary' to mean that Ms. Johnson had a choice: She could voluntarily choose to live in the shelter and pay all but $45 of her income towards the $3,000 monthly cost of her care, or she could choose not to live in the shelter. Since she brought suit over the co-payment practice, the Court clearly did not use the word 'voluntary' in the sense that she could live in emergency housing even if she did not choose to make the monthly payment.

This is nearly identical to the situation presented in *Reames*. The Oklahoma Medicaid Program requires her to contribute all but $50 of her Social Security benefits toward the approximate $3,000 monthly cost of her care. Petitioner, like Ms. Johnson, had the choice of living in the nursing home with Medicaid subsidy, or living elsewhere. Since the cases are so similar, instead of supporting Petitioner, *Johnson* fully confirms the Tenth Circuit's decision in *Reames*.

Citronelle

In *Citronelle-Mobile Gathering, Inc. v. Watkins*, 934 F.2d 1180 (11th Cir. 1991), the Eleventh Circuit addresses the 'legal process' portion of 42 U.S.C. § 407(a). The case dealt with $2,826 of Social Security benefits in an account containing $63,000 belonging to a man who fled to Switzerland with $10,000,000 in ill-gotten gains. The Eleventh

Circuit stated that the purpose of 42 U.S.C. § 407(a) is to, " . . . insure that recipients have the resources necessary to meet their most basic needs, and that when a person's ability to care for his basic needs." *Id.*, at 1192.

Although this decision could be an illustration of the adage that bad facts make bad law, the quoted language is in harmony with the other Circuits. This case, far from being contrary to the Tenth Circuit, supports the *Reames* decision. Requiring Petitioner to contribute to the cost of her nursing home care does not impair her ability to provide for her basic needs, which are provided by the nursing home – and paid for by Petitioner and Medicaid.

Lopez

In *Lopez v. Washington Mutual Bank*, 302 F.3d 900 (9th Cir. 2002), the Ninth Circuit reviewed a situation in which Social Security benefits were directly deposited into a checking account, and then used by the bank to repay overdrafts.

Petitioner appears to argue that the Ninth Circuit found that 42 U.S.C. § 407(a) allows a voluntary assignment of Social Security benefits. However, the Court did not address the 'assignment' of 42 U.S.C. § 407(a), instead limiting itself to a 'legal process' analysis. The Court found that the banking arrangement did not come within the 'legal process' provision of 42 U.S.C. § 407(a).

Summary

As shown above, none of the decisions cited by Petitioner address the 'assignment' portion of 42 U.S.C.

§ 407(a) or support her claim that *Reames* is in conflict with other Courts of Appeal.

Also shown above is that the cases cited by Petitioner either do not conflict with *Reames*, or actually support the decision of the Tenth Circuit – as long as Petitioner's basic needs are being provided for, the Oklahoma Medicaid Program acted properly in requiring that Petitioner contribute to the cost of her nursing home care.

II. *Reames* Is in Harmony with the Decision of this Court in *Wash. State Dep't of Soc. & Health Servs. v. Keffeler.*

In *Wash. State Dep't of Soc. & Health Servs. v. Keffeler*, 537 U.S. 371, 385 (2003), this Court construed the 'other legal process' provision of 42 U.S.C. § 407(a). This Court applied the interpretive rules of *noscitur a sociis* and *ejusdem generis* to the phrase and concluded that 'other legal process' must refer to a judicial or quasi-judicial mechanism because it follows, and refers to, the words 'execution, levy, attachment and garnishment'.

Petitioner reasons that since 'other legal process' must be construed in light of the preceding words, then the 42 U.S.C. § 407(a) prohibition on transfer or assignment applies only to transfers or assignments involving judicial proceedings because the words 'transferable or assignable' are followed by the phrase 'at law or in equity'. No authority is cited for argument.

Petitioner's argument hinges on the assumption that the phrase 'at law or in equity' refers to judicial proceedings. Contrary to Petitioner's assertion, 'at law or in equity' has a broader meaning.

Black's Law Dictionary, 159 (Revised 4th ed. 1968), defines 'at law' as, "According to law; by, for, or in law; particularly in distinction from that which is done in or according to equity." 'In equity' is defined as, "In a court of equity, as distinguished from a court of law; in the purview, consideration, or contemplation of equity; according to the doctrines of equity." *Id.*, at 894. 'Equity' is defined as, "In its broadest and most general signification, this term denotes the spirit and the habit of fairness, justness, and right dealing which would regulate the intercourse of men with men." *Id.*, at 634.

That 'at law or in equity' uses the terms in the sense of rights arising from a law, or arising from equitable principles, is made clear by the many cases dealing with contracts in which the phrase is used to indicate rights arising from a law or from equitable principles. *E.g., Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 683 (1996).

Petitioner's construction of the phrase 'at law or in equity' also violates a basic rule of statutory construction. If 'at law or in equity' requires judicial proceedings, then the phrase is superfluous because, as this Court held in *Keffeler*, 'other legal proceedings' encompasses court proceedings other than execution, levy, attachment or garnishment. If 'at law or in equity' requires legal proceedings, then those proceedings would be encompassed within 'other legal proceedings', making 'at law or in equity' superfluous. Petitioner's construction of 'at law or in equity' thus violates the longstanding rule of statutory construction, most recently stated by this Court in *Beck v. Prupis*, 529 U.S. 494, 506 (2000), " . . . that terms in a statute should not be construed so as to render any provision of that statute meaningless or superfluous."

It is abundantly clear that Petitioner's claim that *Reames* is in conflict with *Keffeler* is based on faulty logic and failure to apply basic canons of statutory construction. There is simply no conflict between *Reames* and *Keffeler* and therefore no reason to grant *certiorari*.

III. The Tenth Circuit Gave Proper Deference to the State Medicaid Manual.

The Tenth Circuit found that if Petitioner placed her Social Security benefits into a trust conforming to the requirements of 42 U.S.C. § 1396p(d)(4)(A) in the month received, her income would not be exempted from the requirement that she pay all but $50 of her income towards the cost of her care. In reaching this conclusion, the Court relied on the SMM.

The SMM is a non-APA publication of the United States Department of Health and Human Services' Centers for Medicare and Medicaid Services (CMS), which the Secretary of the United States Department of Health and Human Services has designated to be responsible for administering the Medicaid program. The SMM is analogous to the Social Security Administration's POMS, which was discussed in *Wash. State Dep't of Soc. & Health Servs. v. Keffeler*, 537 U.S. 371 (2003).

In *Keffeler*, this Court discussed the deference to be accorded the POMS in light of *Chevron, U.S.A. v. Natural Resources Defense Counsel*, 467 U.S. 837 (1984), stating that Keffeler ignored, " . . . the settled administrative law principle that an open-ended and potentially vague term is highly susceptible to administrative interpretation subject to judicial deference." *Keffeler*, at 390.

The *Keffeler* POMS analysis is similar to the analysis the Tenth Circuit had to make in *Reames* – determine the weight to be given to the SMM when construing 42 U.S.C. § 1396p(d)(4)(A) within the context of the tangled provisions of the Medicaid Act. This Court commented on the complexity of the Medicaid Act in *Schweiker v. Gray Panthers*, 453 U.S. 34 (1981), which addressed a Medicaid financial eligibility statute:

> The Social Security Act is among the most intricate ever drafted by Congress. Its Byzantine construction, as Judge Friendly has observed, makes the Act "almost unintelligible to the uninitiated." *Friedman v. Berger*, 547 F.2d 724, 727, n. 7 (CA2 1976), cert. denied, 430 U.S. 984, 97 S.Ct. 1681, 52 L.Ed.2d 378 (1977). Perhaps appreciating the complexity of what it had wrought, Congress conferred on the Secretary exceptionally broad authority to prescribe standards for applying certain sections of the Act. *Batterton v. Francis*, 432 U.S. 416, 425, 97 S.Ct. 2399, 2405, 53 L.Ed.2d 448 (1977).

Id., at 43.

In addition to commenting on the Medicaid Act, in *Schweiker* this Court found that the relevant Medicaid statute had explicitly delegated substantive authority to the Secretary, whose construction of the statute was therefore entitled to legislative effect. This is identical to the situation presented in *Reames*. 42 U.S.C. § 1396a(a)(17) says that a state's Medicaid program must have reasonable standards for determining eligibility for, and extent of Medicaid, and must count only the income and resources, " . . . within standards prescribed by the Secretary." With regard to 42 U.S.C. § 1396p(d)(4)(A), the Secretary of HHS has prescribed standards, **through the SMM**, for counting

income and resources for a person who has a trust meeting the requirements of 42 U.S.C. § 1396p(d)(4)(A). Therefore the portion of the SMM addressing this question is entitled to judicial deference and the Tenth Circuit acted in harmony with *Chevron* in so doing. Petitioner's *Chevron* argument therefore fails and *certiorari* is not necessary in order to address the issue.

IV. *Reames* Does Not Conflict with *Olmstead v. Zimring*.

Petitioner asserts that the Tenth Circuit ignored public policy, set forth in *Olmstead v. Zimring*, 527 U.S. 581 (1999), that disabled people should not be confined to institutions because she needs Social Security benefits to engage in activities outside of her nursing home. In making this argument, Petitioner fails to understand the difference between herself and the *Olmstead* petitioners.

The *Olmstead* petitioners were able, and willing, to move from their institution into the community. *Id.*, at 593. Petitioner does not propose to move home, but wants to use her Social Security benefits for activities in the community. She testified in the District Court that she wanted to use her Social Security benefits to eat at Red Lobster; go shopping; go to concerts in Oklahoma City and Dallas; and take hot air balloon rides.

Petitioner certainly does not come within the same category as the *Olmstead* plaintiffs and does not cite authority to show that *Olmstead* has been, or should be, extended to apply to people in her situation.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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